

In the Matter of Merchant Mariner's Document No. Z-265968 and all
other Seaman Documents
Issued to: JOSEPH W. FELICE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1056

JOSEPH W. FELICE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 6 January 1958, an Examiner of the United States Coast Guard at New York, suspended Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while serving as an able seaman on board the American SS EXCAMBION under authority of the document above described, on or about 29 June 1957, Appellant wrongfully addressed the ship's Second Officer with profane and abusive language; on or about 9 July 1957, Appellant failed to turn to and perform his duties.

The form containing the charge and specifications was served on Appellant on 12 December 1957. This form also directed Appellant to appear at the Coast Guard office in New York City on 2 January at 1000 for the hearing. At the time of this service, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. The hearing was conducted in absentia on 2 January since Appellant was not present. The Examiner entered a plea of not guilty to the charge and each specification on behalf of Appellant.

The Investigating Officer introduced in evidence a copy of the charge and specification form (signed by Appellant acknowledging receipt of the charges and summons to appear), a certified copy of an extract from the Shipping Articles for the voyage in question, and certified copies of two entries in the ship's Official Logbook pertaining to the alleged offenses.

At the conclusion of the hearing, the Examiner rendered the decision in which he concluded that the charge and two specifications had been proved. An order was entered suspending all documents, issued to Appellant, for a period of two months outright and four months on twelve months' probation.

The decision was served on 6 January 1958. Appeal was timely filed on 21 January.

FINDING OF FACT

Between 26 June and 12 August 1957, Appellant was serving as an able seaman on board the American SS EXCAMBION acting under authority of his Merchant Mariner's Document No. Z-265968 while the ship was on a foreign voyage.

During a fire and boat drill on 29 June 1957, Appellant was ordered by the Second Officer to assist another seaman in cranking one of the lifeboats onto its cradle. Appellant refused to obey this order by directing a profane and abusive reply to the Second Officer in a loud voice. Passengers were mustered nearby on the open deck. Appellant then obeyed the repeated order. In his reply to the log entry concerning this incident, Appellant admitted using profane language.

While the ship was at Barcelona, Spain on 9 July 1957, Appellant failed to turn to and perform his duties from 0800 to 1200. Appellant was logged and fined four hours' wages (\$5.89). His reply to the log entry was that he went to bed because he felt sick and dizzy. He did not indicate in his reply that he had reported such illness to anyone or that he had been excused from performing his duties.

In each instance, the offense was entered in the ship's Official Logbook and it is stated that each entry was read to Appellant. His separate replies appear after each offense logged although he did not sign his reply to the entry pertaining to the first offense. In both cases, the signatures of the Master and at least one other ship's officer appear under the completed log entry including Appellant's reply. There is no statement in the logbook that a copy of either entry was given to Appellant. The copies of the entries in evidence were certified as true and correct copies by a Coast Guard Investigating Officer who also certified, in each case, that "a copy of the above entry was given to Joseph W. Felice."

Appellant's prior record consists of a one-month suspension in 1943 for the of ship's supplies and an admonition in November 1955 for addressing a superior officer with profane language.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that Appellant inadvertently failed to appear for the hearing on January because he thought it was

scheduled for 3 January on which date he appeared at the Coast Guard office in New York City.

Logbook entries constitute the sole evidence against Appellant. He would have been afforded no opportunity to cross-examine even if he had been present at the hearing.

Appellant has a good defense to each charge. Appellant had been unjustifiably goaded by the Second Officer. Appellant was ill and had reported this on the day he failed to turn to.

A rehearing is respectfully requested so that Appellant may present his case.

APPEARANCES: Messrs. Walter & Tepper of New York, of Counsel.

OPINION

Appellant received timely, written notice on 12 December 1957 to appear for a hearing on 2 January. His appeal indicates that he returned to New York City on 31 December and remained there through 3 January. Hence, the excuse that Appellant was under the impression that the hearing was to be on 3 January is not a justifiable cause to reopen the hearing after Appellant's failure to put in an appearance on 2 January as directed.

The two entries in the Official Logbook make out a prima facie case with respect to the two specifications because there was substantial compliance with the requirements of 46 U.S.C. 702. Thus, the entries are admissible in evidence, as exceptions to the hearsay rule, as records made in the regular course of business within the meaning of 28 U.S.C. 172. Although the statutory requirement of a statement in the logbook that the offender had been given a copy of the entry was not complied with, the alternative requirement of a statement fact above.) Also as required, Appellant's reply was entered in the logbook in both cases. Appellant did not sign his reply to the first logging but there is no such requirement in 46 U.S.C. 702. With respect to signature, this statute requires that the entry of the offense, the alternative statement mentioned above and the seaman's reply, if any, be signed "by the master and by the mate or one of the crew." This requirement was complied with by the signature of the Master and at least one other ship's officer in each case. In fact, the Second Officer who was directly involved signed the entry regarding the first offense. The second entry was signed by the Chief Officer, who is usually responsible for the work of deck personnel, and the Junior Assistant Purser. Unless we are to attribute bad faith, without any showing of such, to the acts of ship's officers in signing logbook entries, we must assume that the purported

replies of Appellant were, in fact, his replies in both cases.

The nature of the logbook entries under consideration are substantially the same as those referred to in Commandant's Appeal No. 1027. In that case, the order of the Examiner was affirmed on the sole basis of an entry in the ship's Official Logbook. As in the present case, the hearing was conducted in absentia.

It is true that Appellant would not have had an opportunity to cross examine even if he had been present at the hearing. Nevertheless, Appellant could have presented evidence, in an attempt to rebut the prima facie case, to support his contention that he has a good defense to both charges. In the face of Appellant's admission in his reply to the first entry that he did use "some profane language" and the absence of any claim in his second reply that he sought authority to be excused from his work due to illness, it is unlikely that Appellant could have overcome the prima facie case against him. With respect to the second offense, it is noted that Appellant apparently performed his duties on the afternoon of the day on which he claims he was sick.

The certification by the Investigating Officer, that a copy of the log entry (in each case) was given to Appellant, was improper but not prejudicial. These certifications were not necessary and have been given no weight in this decision. It was not stated in the certifications whether the copies referred to therein were given to Appellant at the time of the loggings or at the time of the certifications fifteen to twenty-five days later. In any event, the requirements of the statute were met at the time of the loggings by stating that the entries were read to Appellant and noting his replies. The absence of the alternative statement that Appellant was given copies at the time of the loggings does not justify a conclusion that he was not given copies on those two occasions.

Under the circumstances, it is my opinion that Appellant is not entitled to a rehearing and, furthermore, that such a rehearing would serve no useful purpose if granted. Hence, this request is denied and the order of suspension will be upheld. This is the second time in slightly more than two years that Appellant has been found guilty of addressing a superior officer with profane language. This is a serious infraction of shipboard discipline as also is the failure to perform assigned duties.

ORDER

The order of the Examiner dated at New York, New York, on 6 January 1958, is AFFIRMED.

A. E. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 23rd day of July, 1958.